
Deployment of U.S. Military, Civilian and Contractor Personnel to Potentially War Hazardous Areas from a Legal Perspective

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The Problem

Recent international events raise questions as to what aspects of international law apply to personnel who are deployed to high risk (potential combat) areas. In response, we at Hanscom Air Force Base Electronic Systems Center (ESC) have researched these matters and provide the following information, in summary form.

Discussion

In general, the military and civilian employees of the Department of Defense are covered by status of forces agreements (SOFAs) between the United States government and allied nations or international organizations. These agreements, although similar, contain different rights, duties and obligations of the U.S. government (generally “the sending nation”) and the foreign country (generally “the receiving nation”). The SOFAs in broad terms cover such things as the rights, privileges, duties, status and immunities of United States citizens under international law.¹ For the reader’s convenience, we have included the website for a list of countries with which the United States has a formal SOFA.²

SOFAs We Have Dealt with at ESC

For the most part, SOFAs are similar and cover the same generic topics, regardless of what country or international organization they are with. These include, for example, a definitions section; a clause requiring the sending state to respect the laws of the receiving state; exemption from specified passport or visa regulations; credentials required the receiving nation for personnel of the sending nation, including personal identity cards (IDs); appropriate travel orders; automobiles (or other) special driving privileges; the right bear arms in the receiving state; determination of criminal jurisdiction over persons sent by the sending state; security requirements; due process requirements; settlement of claims (often a waiver of claims by participating countries against each other); control of in-country purchases (business and personal); relief from certain taxes; duties and customs; and the status/privilege and duties of dependents.

Although the generic topics above are usually addressed in SOFAs, there are significant differences in the scope of any particular SOFA and or related agreements as will be discussed below. With this in mind, it is useful to examine the North Atlantic Treaty Organization (NATO) SOFA.³

Article IX of the NATO SOFA provides coverage for “Members of a force (i.e., military members) or a civilian component and their dependents....”. Thus, it is clear, the NATO SOFA in its original text does not cover contractors. Most other SOFAs do not automatically cover contractors either. The NATO SOFA has a supplemental agreement pertaining to forces stationed in Germany, however, and Article 73 of the supplemental agreement does cover contractor personnel if they qualify as “technical experts.”⁴ No other NATO country (to our knowledge at this time) grants technical expert status to contractor personnel. The SOFAs for countries such as Japan and Korea, however, as well as a host of other countries, do provide such coverage for contractor personnel who qualify as technical experts.

Potential Problems Arising from Lack of SOFA Coverage for Contractor Personnel

It is axiomatic that, on one level, SOFA benefits such as base-exchange, postal, housing, schools for minor dependent children and medical privileges (on a reimbursable basis) are a pricing term for any resulting contract. To the extent that a contractor can price its services lower where SOFA benefits are available, the United States (or the purchasing government in a foreign military sales case) can save money.

Perhaps more importantly, in the case of hostile zones such as Saudi Arabia during Desert Storm, or Bosnia at the time NATO first deployed there, SOFA benefits for contractors take on a new dimension. Contractors did accompany the forces in Desert Storm, and many contractor personnel are currently accompanying our forces in (and around) Bosnia and Kosovo, for example. They are also currently deployed in Saudi Arabia, Kuwait, and Korea, to name a few additional countries.

A major problem associated with Bosnia concerning contractor personnel was that there was no SOFA coverage extended to contractors by NATO member nations, except as previously noted while they are in Germany. The second problem for contractor personnel arose from the fact that the United States had no SOFA Agreements with any of the Eastern Bloc nations, where troops and supporting contractors would be sent.⁵ These included, but were not necessarily limited to the Federation of Bosnia and Herzegovina, the Republic of Srpska, the Republic of Croatia, and the Republic of Yugoslavia.

The treaty⁶ signed at Dayton, Ohio in November 1995 provided a solution to the problem. While the treaty itself did not extend diplomatic or SOFA-type benefits to contractors, a related treaty did. Specifically, subparagraph 2 of the Bosnian treaty invokes a 1946 treaty with the United Nations.⁷ Article VI of that treaty provides diplomatic immunity for “technical experts” who accompany military forces on a United Nations mission. We at ESC took the view that the then current peace keeping activity in Bosnia was just such a mission. NATO forces replaced the previous United Nations peacekeeping forces under the auspices of the United Nations Security Council. In other words, NATO was in Bosnia at the behest of the United Nations. They are in Bosnia on a United Nations mission and that is why we believed the NATO troops came under the 1946 treaty when they were first deployed. Those troops are referred to as the International Forces, or IFOR. Since then, the U.S. has SOFAs with Bosnia-Herzegovina and Croatia related to IFOR. We also have SOFAs in place with Slovenia and the Former Yugoslav Republic of Macedonia (FYRM). Hungary is used as a staging area for IFOR, and the NATO SOFA currently applies there.

For the reasons stated above, when NATO first deployed, contractor personnel who qualified as technical experts accompanying the forces, they were entitled to the privileges and immunities of the cited United Nations treaty. On the strength of the view stated above, we encouraged the appropriate USAF sponsoring agency to provide Geneva Convention cards, i.e., DD Form 489

cards, to qualified contractor personnel who accompanied U.S. and United Nations troops on their mission, in accordance with then existing AFT 36-3001, subparagraph 1.3.6

The Geneva Convention identification card is intended to provide the bearer Geneva Convention protections in the event of capture during hostile enemy actions.⁸ In addition to basic personal identification, it identified the bearer as a non-combatant, and entitles the bearer to the same treatment under the rules of war of a military member of equivalent rank.⁹ For these reasons, we consider issuance of the Geneva Convention card a matter of utmost importance for both civilian component members of the force.¹⁰ However, a new identification card has been devised to cover contractor personnel that did not exist when we first deployed with NATO to Bosnia. It is a DD Form 2764, United States DoD and Uniformed Services Civilian Geneva Conventions Identification Card.¹¹

Eligibility for the new DD Form 2764 is set forth in paragraph 6.27 and is issued “to an employee who becomes eligible.”¹² It is a sponsor card¹³ and is not issued to dependents of eligible contractor employees since dependents will be granted a different card (a DD Form 1173 dependent ID card).¹⁴ Further, the DD Form 2764 is available only as a machine-readable card (i.e., there is no manually-prepared version of this form),¹⁵ unlike the DD 1173. The DD 2764 requires the following:

- The DD Form 2764 is not to be over stamped *Overseas Only*. The word *Overseas* will be printed within the authorized patronage block of the identification card.
- The authorized patronage block for eligible individuals permanently assigned within CONUS will be blank. Travel orders authorize access for these individuals while en route to the deployment site.
- During a conflict, combat, or contingency operation, all individuals with a DD Form 2764 will be granted all commissary, exchange, MWR, and medical privileges available at the site of the deployment, regardless of the statements on the ID card.
- The medical block on this card will contain a statement, “When TAD/TDY¹⁶ or stationed overseas on a space-available fully reimbursable basis.”
- Civilian employees *and contractual service employees providing support when forward deployed* during a conflict, combat or contingency operation are treated in accordance with the ASD(HA)¹⁷ memorandum of January 8, 1997, *Medical Care Costs for Civilian Employees Deployed in Support of Contingency Operations*. This policy states that it is not considered practicable or cost effective to seek reimbursement from civilian or *contractor employees* or third party payers for medical services rendered by forward deployed medical units. However, where a civilian or *contractor employee* is evacuated for medical reasons from the contingency area of operations to a medical treatment facility funded by the Defense Health Program, normal reimbursement policies would apply for services rendered by that facility. (Emphasis added)¹⁸

Since the paragraphs above establish the type of base support the contractor is entitled to upon issuance of the DD Form 2764, the contract should contain a special provision to reflect the specific base support to be provided to contractor’s employees.

Recommended Procedure for Contract Implementation of SOFA or Other Rights

For purposes of assuring that SOFA benefits or other rights that can be afforded to a contractor are in fact provided, there is a certain process that we at the ESC employ. First, we study the

appropriate country SOFA and develop a checklist of the rights, duties, and obligations created thereby. We then create what is loosely described as an instruction for proposal preparation to assist the contractor in both bidding, and performance. While not all-inclusive, it contains detailed advice of some “dos” and “don’ts” for its personnel in country, such as arrest, claims, tax issues, etc. While the instruction for proposal preparation is a non-binding, non-contractual document, contractors have indicated it contains useful guidance for their performance of a contract.

For negotiation purposes, proposed contract clauses are included in the request for proposal model contract. In one instance, an existing contract was modified to authorize contractor engineering support in many countries around the world; after passing on SOFA type benefits to the contractor, that contractor was able to modify some existing contract rates downward, and pass significant savings on to the government.

There are other clauses that should be considered for use in any contract that requires foreign performance. The *Federal Acquisition Regulation (FAR)* and *Defense FAR supplement (DFARS)* clauses should be examined in detail for inclusion in the contract when appropriate. Also, check applicable international agreements to determine if any special contract clauses are required. This includes foreign performance to satisfy foreign military sales requirements, or to satisfy United States “bona fide” needs in foreign countries.¹⁹ Certain clauses are derived from specific statutory or regulatory authority and these sources should be reviewed during contract preparation. Others of note, which we believe require special comment and analysis, are summarized below.

The Defense Base Act, at 42 U.S.C. Section 1651 et. seq., as amended,²⁰ and the *War Hazards Compensation Act*, at 4 U.S.C. Section 1701 et. seq., as amended. In general extend the coverage of the *Longshoremen’s and Harbor Worker’s Act*, at 33 U.S.C. Section 901 et. seq., to contractor employees in foreign countries.²¹ In accordance with these statutes, contractors (through appropriate insurance) are required to provide contractor employees coverage for injury, disability, death, or detention by an enemy.²² The cost of subject insurance is partially reimbursable to the contractor by the Department of Labor. The balance would (if reasonable and allowable in accordance with FAR part 31), be reimbursable under the contract. There is specific guidance in the FAR and DFARS as to the use of these clauses which should be reviewed during contract preparation.

Current Air Force policy related to the *Defense Base Act* is reflected in an 8 February 2001 memorandum from the Acting Secretary of the Air Force, Subject: *Interim Policy Memorandum-Contractors in the Theater with USAF Guidance on Contractors in the Theater* as an attachment. The following summarizes the gist of current Air Force policy:

Pursuant to the *Defense Base Act* (42 U.S.C. 1651 et. seq) U.S. contractor personnel deployed in a theater of operations to perform “public work” may qualify for workers’ compensation if injured, killed or missing while deployed. Compensation and limitations are further explained in the *War Hazards Compensation Act* (42 U.S.C. 1701 et. seq). Ordinarily, contractors will be required to obtain insurance coverage for such risks and potential compensation on behalf of its employees (FAR 28.305, 52.228-3 or 52.223-4).

Based upon the statute cited above, we recommend incorporation of a special clause to implement these requirements in any resulting contract. Moreover, special clauses should be crafted to incorporate SOFA benefits, or other provisions consistent with the authority contained in any relevant international agreement.

When contractor personnel are deployed in support of the Air Force they can, and should, be granted force protection and support services commensurate with those provided to DoD civilian personnel to the extent authorized by United States and host nation law.²³

Conclusion

Passing on SOFA and other benefits to contractor technical experts accompanying the forces can save the U.S. government money and provide substantial benefits to the contractor. Providing such benefits creates a “win-win” situation for both the contractor and the government.

End Notes

1 The opinions set forth herein are those of the authors and do not necessarily reflect official Air Force policy.

2 <http://www.lawguru.com/ilawlib/89.htm>. This site includes treaties as well as SOFAs and other international related information.

3 We have relied, in large part, upon an article regarding SOFAs written by Colonel Richard J. Erickson, USAF(Ret) entitled “Status of Forces Agreement; A Sharing of Sovereign Prerogative” which was printed in *The Air Force Law Review*, Volume 37 (1994), p. 137 et. seq., as a primary background source for this memorandum.

4 *The Supplemental Agreement to the NATO Status of Forces Agreement* (effective 18 January 1974) creates status for civilian contractor “technical experts” who accompany a military force to Germany by providing: “Article 73 Technical experts whose services are required by a force and who in the Federal territory exclusively serve that force either in an advisory capacity in technical matters or for the setting up, cooperation or maintenance of equipment shall be considered to be, and treated as, members of the civilian component. This provision, however, shall not apply to (a) stateless persons; (b) nationals of any State which is not a Party to the North Atlantic Treaty; (c) Germans; (d) persons ordinarily resident in the Federal territory.”

5 Since that initial NATO deployment, three former Eastern Bloc nations have joined NATO and have ratified the NATO SOFA: Hungary, Poland, and the Czech Republic.

6 Hereinafter “the Bosnian Treaty.”

7 The convention on Privileges and Immunities of the United Nations, dated 13 February 1946.

8 As indicated in Colonel Robert L. Bridge, USAF (Ret.) article entitled “Operation Law; An Overview,” published in *The Air Force Law Review*, Volume 37, 1994, p. 1, footnote 1, there are four Geneva conventions. These are: convention (I) for the amelioration of the condition of the wounded and sick in, armed forces in the field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; convention (II) for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; convention (III) relative to the treatment of prisoners of war, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; convention (IV) relative to the protection of civilian persons in time of war, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

9 While in Saudi Arabia in late 1991, Mr. Oulton was advised that some Saudis examined Geneva Convention cards at certain check points. At that time, he did not possess such a card but fortunately was never asked for one.

10 While preparing to go to Iran in December 1979, Mr. Oulton was cautioned by passport issuing officials that his government passport photo did not really look like him. He then had them done commercially in color instead of the government-issued black and white photos. The quality of such photos is clearly important when traveling abroad. (Trip set for 5 December was cancelled. Shah of Iran's regime fell soon after.) Not only should persons accompanying the force carry such cards, but the cards should be current, reflecting the bearer's current legible photograph.

11 This new identification card was established in AF136-3026 (I), 29 July 1999, (Identification Cards for Members of the Uniformed Services, Their Family Members, and Other Eligible Personnel), via the addition of Section 61. This AFI is part of a joint regulation issued by the Secretaries of the Air Force, the Army, the Navy, the Marine Corps, the Coast Guard, the Secretary of Commerce, and the Secretary of Health and Human Services. The AFI bears the following legend below the title on the cover page: "Compliance with this publication is mandatory."

12 AF136-3026 (I), Section 6.27.1.

13 Ibid., Section 1.3.9

14 Ibid., Section 6.28. Eligible dependents are entitled to the DD Form 1173, "Uniformed Services Identification and Privilege Card."

15 Ibid., Section 6.29

16 Temporary Additional Duty/Temporary Duty. See, Joint Publication (JP) 1-02, *DoD Dictionary of Military and Associated Terms*.

17 Assistant Secretary of Defense (Health Affairs). See, JP 1-02.

18 Ibid., Section 6.29.1, et. seq. In addition, according to an article on p. 18 of the 23 April 2001 edition of the *Air Force Times*, a computerized identification card known as a "smart card" will replace all existing IDs. What impact, if any, this will ultimately have on Geneva Convention cards remains to be seen.

19 These latter requirements are (generally) funded by U.S. appropriated funds.

20 The purpose of the *Defense Bases Act* (DBA) was to provide essentially the same relief to outlying territories as the existing workers' compensation law gives to employees in the United States. *Lee v. Boeing, Inc.*, 7 F.Supp. 2d 617 (D. Md 1998), 1998 U.S. Dist. LEXIS 7809.

21 *The Longshoremen's and Harbor Workers Act* was, in effect, incorporated verbatim into the *Defense Bases Act* except where modified by the UBA. See, *Lee v. Boeing Inc.*, supra.

22 See *Code of Federal Regulations* (C.F.R.) at 20 C.F.R. Part 61, et. seq.

23 See, AFMAN 10-401, Vol. 2.

About the Authors

Donald P. Oulton, Chief, International Law Branch Contract Support Division Office of the Staff Judge Advocate, joined Hanscom Air Force Base's Electronic Systems Division as its Foreign Military Sales Attorney in 1976. In 1980, he was selected as the Air Force Systems

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In 1983 Donald Oulton was selected as the outstanding senior civilian in the Electronic Systems Division of Air Force Systems command, and presented the Harold M. Wright award. Donald Oulton was certified as a "Level 5 Managerial Contract Law Attorney" by the Air Force Judge Advocate General, which is the top rating a civilian professional may achieve.

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